

DRAFT FOR DISCUSSION
9/28/07

Section 8
Administration and Accountability

8.1 Purpose and Intent

- A. The City and its staff should be encouraged to comply voluntarily with the Sunshine Ordinance. Regular education and training about the Sunshine Ordinance is essential to achieve voluntary compliance.
- B. The City Manager's Office must provide to the Council regular reports, at least annually, about the City's compliance with the Sunshine Ordinance.

8.2 Open Government Officer

- A. The City will establish the position of Open Government Officer. The Open Government Officer will be a member of Senior Staff and report to the City Manager.
- B. The Open Government Officer will:
 - 1. Advise the City Manager on education and training for City Staff on the Sunshine Ordinance and other open government laws;
 - 2. Staff the Open Government Commission;
 - 3. In the event a response to a request for a public record is challenged, act as a liaison to the appropriate City Council, Office of a Council Appointee or City Department to access the record requested;
 - 4. Work with the Records Manager to access information that can be used to generate routine statistical reports requested by the community;
 - 5. Coordinate reports to the City Council evaluating and monitoring compliance with the Sunshine Ordinance; and
 - 6. Audit the recordings of closed session to determine compliance with the Brown Act.

8.3 Open Government Commission

- A. The City will establish a neutral and independent Open Government Commission comprised of five members of the community or integrate the function of the Commission as described below into an existing Board or Commission as long

as the members meet the following criteria. Each member must have some demonstrated familiarity and experience with open government laws and be a resident of the City of San Jose. The Commission's membership should be representative of the community and all members will be required to undergo a screening process to identify any potential conflicts of interest. Members must not be a paid City employee, a paid employee working on the campaign of a current Councilmember or candidate for City office or a contract lobbyist registered with the City. No member may participate as a candidate in any election for Mayor or Councilmember for the City of San Jose for a period of one year both before and after tenure on the Commission. One member of the Commission will be an attorney licensed to practice law in California. Members will be appointed by no less than two-thirds vote of the City Council.

B. The Open Government Commission will:

1. Advise the City Council about the Sunshine Ordinance;
2. Determine, if questioned or challenged, the categorization of bodies as policy, ancillary or non-governmental;
3. Prepare reports to the City Council evaluating and monitoring compliance with the Sunshine Ordinance;
4. Develop an annual report, based on public input, indicating additional public information, if any, that the City should routinely make available to the public; and
5. Review and investigate allegations of violations of the Sunshine Ordinance and take enforcement action where appropriate.

8.4 Investigations

- A. The City Council will adopt, by resolution, regulations and procedures for investigations and hearings to be conducted by the Open Government Officer and Open Government Commission.
- B. The Open Government Officer and Open Government Commission will have the authority to investigate complaints alleging violations of the Sunshine Ordinance, in accordance with the regulations and procedures adopted by resolution of the City Council.
- C. A complaint filed with the Commission may be investigated only if the complaint identifies the specific alleged violation which forms the basis for the complaint and contains sufficient facts to warrant investigation. If requested, a complainant may make a complaint anonymously.

- D. The City Council will retain an independent and neutral Legal Evaluator, selected by the Commission, to make recommendations to the Commission. The City Council will appropriate funds anticipated to be needed to fund the Legal Evaluator for a period of two years.
- E. The City Attorney's Office may provide legal advice to the Commission related to non-complaint matters or general interpretations of the San Jose Municipal Code or relevant California State or federal law, but must not participate in investigations or reviews of complaints.

8.5 Subpoena Power

- A. The Commission may subpoena witnesses, compel attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of documents or other items.
- B. The subpoena power will be used only after a finding by the Commission that the information or testimony is essential for a determination and material to its duties or exercise of its powers and that good faith efforts to acquire relevant information have failed.

8.6 Enforcement

8.6.010 Requests for Public Records

- A. When a complaint is filed with the Commission alleging that records or some part of records are being withheld improperly, the Commission will refer the complaint to the Open Government Officer. The person or persons against whom the complaint is made must be notified of the complaint and provided a copy of the regulations and procedures of the Commission.
- B. If the Open Government Officer cannot resolve the complaint, the Commission will refer the complaint to its Legal Evaluator. If necessary, the Legal Evaluator will make a recommendation about the complaint after examining the record "in chambers."
- C. If the City argues that the record is an attorney-client communication, official information and identity of an informer, a trade secret or attorney work product and the Legal Evaluator is unable to so determine without requiring disclosure of the information claimed to be privileged, the Legal Evaluator may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information "in chambers" out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the Legal Evaluator determines that the information is privileged, neither the Legal Evaluator nor any other person may ever disclose, without the

consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings “in chambers.”

- D. The Legal Evaluator will review and consider the Sunshine Ordinance, California Public Records Act and judicial opinions interpreting the California Public Records Act in making his or her recommendation.
- E. If the Legal Evaluator finds that the City's decision to refuse disclosure is not justified, he or she will recommend to the Open Government Commission that it issue an order to the City to make the record public. If the Legal Evaluator determines that the City was justified in refusing to make the record public, he or she will return the item to the City without disclosing its content with a recommendation to the Open Government Commission that it issue an order supporting the decision refusing disclosure.
- F. If the Open Government Commission deems it necessary, it will hold a hearing to consider the recommendation of the Legal Evaluator. The Commission, by resolution, will issue an order based on a preponderance of the evidence from the entire record before the Commission.
- G. The Open Government Commission's order will be issued to the Council Appointee who is responsible for the decision to refuse disclosure (whether the decision was made by the Council Appointee or an employee over whom the Council Appointee has authority).
- H. If the Council Appointee who is responsible for the decision to refuse disclosure continues to refuse to disclose the record after the Open Government Commission has issued its order, the Open Government Commission will present its order to the City Council at a public meeting.
- I. If the City Council continues to refuse to disclose the record after the Open Government Commission has issued its order, the complainant may file a petition with the Superior Court for issuance of an extraordinary writ. The Open Government Commission may join the complainant as a plaintiff in the petition. The complainant must file the petition within 20 days after service upon him or her of the decision from the City Council not to disclose the record.
- J. The Superior Court will award court costs and reasonable attorney fees to the complainant should the complainant prevail in litigation filed pursuant to this section. The costs and fees will be paid by the City and will not become a personal liability of any employee of the City responsible for making the decision to refuse disclosure. If the Superior Court finds that the complainant's case is clearly frivolous, it will award court costs and reasonable attorney fees to the City.

8.6.020 Public and Closed Session Meetings

- A. Complaints about public and closed session meetings must be made within 90 days of the date of the meeting.
- B. A complaint may be filed with the Open Government Commission alleging that a public or closed session meeting has been held or is threatened to be held by members of a policy body in violation of the noticing requirements of the Sunshine Ordinance.
 - 1. The Commission will refer the complaint to its Legal Evaluator. The Legal Evaluator must notify, in writing, the member or members of the policy body about the complaint and provide a copy of the regulations and procedures of the Commission.
 - 2. If the Legal Evaluator determines that a member or members of a policy body held or are threatening to hold a public or closed session meeting in violation of the Sunshine Ordinance, he or she will recommend that the Open Government Commission issue a demand that the member or members of the policy body cure or correct the action challenged.
 - 3. Within 30 days of receipt of the demand from the Open Government Commission, the member or members of the policy body must cure or correct the challenged action and inform the Commission in writing of either (1) its actions to cure or correct or (2) its decision not to cure or correct the challenged action.
 - 4. If the policy body takes no action within the 30-day period, the inaction will be deemed a decision not to cure or correct the challenged action, and the Open Government Commission may refer the challenged action to the Santa Clara County Office of the District Attorney within 15 days after the 30-day period expires.
 - 5. If the policy body informs the Commission in writing of its decision not to cure or correct the challenged action, the Commission may refer the challenged action to the Santa Clara County Office of the District Attorney within 15 days of receiving notice of the policy body's decision not to cure or correct the challenged action.
 - 6. If the policy body informs the Commission in writing of its actions to cure or correct the challenged action, the Commission will refer the policy body's response to the Legal Evaluator. The Legal Evaluator may recommend that the Commission (1) accept the actions to cure or correct the challenged action; or (2) reject the actions to cure or correct the challenged action and refer the challenged action to the Santa Clara

County Office of the District Attorney within 15 days of receiving notice of the policy body's action to cure or correct the challenged action.

- C. If the Open Government Officer, in the course of his or her audit of the closed session recordings, determines that a policy body discussed some topic in closed session in violation of the Sunshine Ordinance, or, if any person files a complaint with the Open Government Officer alleging that a policy body discussed some topic in closed session in violation of the Sunshine Ordinance, the Open Government Officer will make a complaint to the Rules and Open Government Committee.
1. If the Rules and Open Government Committee determines that the policy body discussed some topic in closed session in violation of the Sunshine Ordinance, it will release, in transcript form, the recording of the topic discussed in closed session in violation of the Sunshine Ordinance.
 2. If the Rules and Open Government Committee rejects the Open Government Officer's complaint and refuses to release, a transcript of the closed session recording, the Open Government Officer may refer the complaint to the Open Government Commission.
 3. The Commission will refer the complaint to its Legal Evaluator. If necessary, the Legal Evaluator will make a recommendation about the complaint after examining the transcript of the closed session recording "in chambers."
 4. If the City argues that the transcript of the closed session recording is an attorney-client communication, official information and identity of an informer, a trade secret or attorney work product and the Legal Evaluator is unable to so determine without requiring disclosure of the information claimed to be privileged, the Legal Evaluator may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information "in chambers" out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the Legal Evaluator determines that the information is privileged, neither the Legal Evaluator nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings "in chambers."
 5. The Legal Evaluator will review and consider the Sunshine Ordinance, Ralph M. Brown Act and judicial opinions interpreting the Ralph M. Brown Act in making his or her recommendation.

6. If the Legal Evaluator finds that the Rules and Open Government Committee's refusal to release the transcript of the closed session recording is not justified, he or she will recommend to the Open Government Commission that it issue an order to the Rules and Open Government Committee to release the transcript of the closed session recording. If the Legal Evaluator determines that the Rules and Open Government Committee was justified in determining that the Sunshine Ordinance was not violated, he or she will return the transcript of the closed session recording to the Rules and Open Government Committee without disclosing its content with a recommendation to the Open Government Commission that it issue an order supporting the decision refusing release of the transcript.
7. If the Open Government Commission deems it necessary, it will hold a hearing to consider the recommendation of the Legal Evaluator. The Commission, by resolution, will issue an order based on a preponderance of the evidence from the entire record before the Commission.
8. If the Rules and Open Government Committee continues to refuse to release the transcript closed session recording after the Open Government Commission has issued its order, the Open Government Commission will present its order to the City Council at a public meeting.
9. If the City Council continues to refuse to release the transcript of the closed session recording after the Open Government Commission has issued its order, the complainant may file a petition with the Superior Court for issuance of an extraordinary writ. The Open Government Commission may join the complainant as a plaintiff in the petition. The complainant must file the petition within 20 days after service upon him or her of the decision from the City Council not to release a transcript of the closed session recording.
10. The Superior Court will award court costs and reasonable attorney fees to the complainant should the complainant prevail in litigation filed pursuant to this section. The costs and fees will be paid by the City and will not become a personal liability of any employee of the City responsible for making the decision to refuse disclosure. If the Superior Court finds that the complainant's case is clearly frivolous, it will award court costs and reasonable attorney fees to the City.

8.6.040 Progressive Penalties

Penalties for violating the Sunshine Ordinance should be progressive.

- A. If the Open Government Commission determines that the complaint arose out of a minor violation based on a misinterpretation of the Sunshine Ordinance, the

Commission may recommend that the person or persons who misinterpreted the Sunshine Ordinance must participate in education and training about the Sunshine Ordinance within 30 days of the date the Commission makes its recommendation.

- B. If the Open Government Commission finds intentional or repeated violation of the Sunshine Ordinance, it may issue a report to the appropriate Council Appointee and the Rules and Open Government Committee.